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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 744

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

Petitioner,

vs.

ARTHUR W. HORN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief for Respondent in Opposition

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The opinion of the District Court of Appeal of the State of California, Second Appellate District, Division Two, is reported at 37 Cal. Rptr. 387. The opinion of the Supreme Court of the State of California is reported at 61 A.C. 659, 39 Cal. Rptr. 721, 394 P. 2d 561.

Questions Presented

1. Whether the defendant in a Federal Employers' Liability Act case, tried in a state court and resulting in a jury verdict in favor of the plaintiff, has an absolute federal right to a new trial on the ground of improper argument on the part of plaintiff's counsel, notwithstanding the fact that the highest court of the state has determined (a) that the defendant conceded to the jury that it was liable to the plaintiff, (b) that the verdict was not excessive as a matter of law, and (c) that under state procedural rules uniformly applied in all civil jury actions, the defendant had waived any right to an appellate consideration of its claims of misconduct.

2. Where such defendant failed to assert at any stage of the proceedings in the state court that it had a right to a unanimous jury verdict, and where the United States Supreme Court has repeatedly denied that a unanimous jury verdict is mandatory in Federal Employers' Liability Act cases tried in state courts, is the defendant entitled to raise this question for the first time in a Petition for a Writ of Certiorari.

Statement of the Case

The plaintiff, a twenty-one year old employee of the defendant, lost his left foot on the job as a result of the defective condition of a coupling device. He

brought an action against the defendant under the Federal Employers' Liability Act and also under the Safety Appliance Act.

Throughout the trial defendant's counsel repeatedly requested the jurors to return a verdict in favor of the plaintiff, stating that he had received authority to ask them to award the sum of $26,650.00 (R.R.T. 49, 234, 248, 818, 819). In his final argument to the jury, defendant's counsel stated that the only reasonable verdict which the jury could return was a verdict for the plaintiff, and he told the jury, in unequivocal terms, to give the plaintiff a verdict in the amount of $26,650.00 (R.R.T. 818-819). Plaintiff's counsel requested the jury to award the sum of $250,000.00 to his client (R.R.T. 762). The jury returned a verdict in favor of the plaintiff in the amount of $149,000.00 (R.C.T. 7).

At no time during the opening or closing arguments of plaintiff's counsel did defendant's counsel object, assign error or request that the jury be admonished. After the completion of the arguments the motion of defendant's counsel for a mistrial was denied (R.T.T. 850-855). He did not make a request at that time that the jury be admonished to disregard any of the statements made in argument by plaintiff's counsel.

In the briefs filed in the state appellate courts the defendant contended that the trial court had erred in its rulings relating to the admissibility of evidence and in several of the instructions which were given

to the jury. The defendant also asserted in its briefs that the verdict was excessive as a matter of law and that plaintiff's counsel had committed prejudicial misconduct in his arguments to the jury. The intermediate state appellate court, without holding that the damages awarded were excessive, reversed the judgment solely on the ground of misconduct on the part of plaintiff's counsel in argument.

The Supreme Court of the State of California granted plaintiff's petition for a hearing and affirmed the judgment entered in the trial court. In its opinion, the California Supreme Court rejected the defendant's contentions relating to the issue of liability, holding that on the record presented the only reasonable conclusion was that the defendant had conceded its liability to the trier of fact and in any event the claimed errors could not have resulted in a miscarriage of justice (R.O. 4). The California Supreme Court also held that, under a well settled procedural rule which has been uniformly applied in appeals arising out of civil actions tried before juries, defendant's claims of misconduct were entitled to no consideration on appeal, since the record did not show that the defendant's counsel had made timely and proper objections or that he had requested that the jury be admonished (R.O. 11-14). It was held that the misconduct of plaintiff's counsel could have been obviated by timely objections and instructions, and by failing to make such objections defendant waived its right to complain (R.O. 11-14).

At no time before, during or after the trial did the defendant ever take the position that it had a right to a unanimous jury verdict in this case. No such contention was made in any of its briefs, and this point was never considered by the state courts. state courts.

ARGUMENT

I.

The Decision of the California Supreme Court Does Not Present Any Federal Question.

A. The determination of the California Supreme Court is based solely upon the application of a state rule of procedure.

The decision of the California Supreme Court in this case rests upon an independent state ground, and it does not present any substantial federal question for review. Under well established rules of procedure in California, seasonable objections must be made at the trial to any improper statements of opposing counsel, and, in order to warrant a new trial or a reversal on that ground, the trial court should be promptly requested to admonish the jury to disregard the improper remarks or comments. In the absence of timely objections and proper requests the alleged misconduct will not be considered on appeal, if an admonishment would have been effective to remove its effect upon the jury. (*State Rubbish etc.*

Assn. v. Siliznoff, 38 Cal. 2d 330, 340; 240 P. 2d 282, 287; *Scott v. Times-Mirror Co.*, 181 Cal. 345, 368; 184 Pac. 672, 682). In some criminal appeals it has been held that if the misconduct of counsel was of such a character that it could not be purged of its harmful effect by an admonition, it may serve as a ground for reversal, even though no objection at all was made and no admonition of any kind was requested on behalf of the accused. (See, e.g., *People v. Lyons*, 47 Cal. 2d 311, 318; 303 P. 2d 329, 333). There does not appear to be any civil appeal in which the California appellate courts have gone that far. In a few cases the failure to object on every possible occasion has been excused where there were at least some objections and where the misconduct involved was regarded as so incurably prejudicial that an admonition would have been ineffective. (See, e.g., *Peacock v. Levy*, 114 Cal. App. 246, 252; 299 Pac. 790, 793).

In other California cases, both civil and criminal, the misconduct of counsel has been held to constitute reversible error, notwithstanding the fact that the jury was in fact admonished to disregard the improper statements. In these cases, the admonitions given by the trial court were regarded as insufficient to cure the harmful effect of the particular misconduct. (See, e.g., *Gackstetter v. Market Street R.R. Co.*, 130 Cal. App. 316, 326-327; 20 P. 2d 93, 97; *Diebler v. Wright*, 119 Cal. App. 277, 282-283; 6 P. 2d 344, 346; cf., *People v. Hidalgo*, 78 Cal. App. 2d

926, 948-949; 179 P. 2d 102, 111). The question in cases of this kind is not whether the appellant waived the right to an appellate consideration of the claim of misconduct, but whether the trial court adequately removed the effect of an impropriety which had been properly brought to its attention and reserved for review on appeal.

None of these rules, of course, are peculiar to California. Similar rules are applied in virtually all of the state courts. (See, 5 Am. Jur. 2d, Appeal and Error, § 624, pp. 82 et. seq.; 4 C.J.S., Appeal & Error, § 297 (2) (a), pp. 918 et. seq.).

It is fundamental that a state may decide, under its own procedural rules, whether or not a claim under a statute of the United States has been set up at the proper time and in the proper manner, provided only that such decision of the state has not been made in a spirit of evasion for the purpose of defeating the claim of federal right. (*Atlantic Coast Line Railroad Company v. Mims*, 242 U.S. 532, 535). In the present case, the California Supreme Court has decided that the defendant, by reason of its failure to comply with the state procedural rule requiring timely objections as a prerequisite to a claim on appeal, is precluded from asserting that the conduct of plaintiff's counsel requires a reversal of the judgment. This decision, therefore, is based upon a non-federal ground, and there is no basis for a review by this Court.

B. The decision of the California Supreme Court does not involve any discrimination against rights arising under federal law.

The procedural rule which has been applied in this case is one which the appellate courts of the State of California have uniformly applied in all types of civil actions tried before a jury. In support of the application of that rule, the opinion has cited several prior decisions of the California Supreme Court. (*Seffert v. Los Angeles Transit Lines*, 56 Cal. 2d 498, 509; 15 Cal. Rptr. 161, 168; 364 P. 2d 337, 344; *State Rubbish etc. Assn. v. Siliznoff*, 38 Cal. 2d 330, 340; 240 P. 2d 282, 287; *Hicks v. Ocean Shore Railroad, Inc.*, 18 Cal. 2d 773, 787; 117 P. 2d 850, 858; *Cope v. Davison*, 30 Cal. 2d 193, 202; 180 P. 2d 873, 879). None of these cases were brought under the Federal Employer's Liability Act or under any other federal statute.

Petitioner has asserted that the California Supreme Court has created a special exception for cases arising under Federal Employers' Liability Act, citing the *Gacksetter*, *Diebler* and *Hidalgo* cases, which have been mentioned above. In those cases, however, the right to an appellate review had been substantially preserved, and the claim of misconduct was considered on its merits. Moreover, in the present case, the California Supreme Court did consider whether the misconduct of plaintiff's counsel was of such a character that its effect upon the jury could

not have been removed by an admonition. The opinion states:

> "In the instant case, we do not deem Mr. Boccardo's conduct to be of such a character that it could not have been obviated by timely objections and instructions." (R.O. 13-14).

It is clear, therefore, that after a thorough and impartial consideration, the California Supreme Court has decided this case without any discrimination against rights arising under federal statute.

There is No Uncertainty or Lack of Uniformity in of the California Supreme Court and any decision of the United States Supreme Court.

Petitioner has stated that the decision of the California Supreme Court is in conflict with the decision of this Court in *Minneapolis, St. Paul, & Sault Ste. Marie Railway Co. v. Moquin*, 283 U.S. 520. There is no conflict. In the *Moquin* case, both the issue of liability and the issue of damages were contested, and the jury's determination of these issues was inextricably blended in a single verdict. On the defendant's appeal from the judgment in favor of the plaintiff, the Supreme Court of Minnesota made an express determination that the verdict was, at least to some extent, the result of passion and prejudice engendered by misconduct on the part of plaintiff's counsel. The State Supreme Court attempted to rectify this situation by requiring the plaintiff to agree

to remit a portion of the verdict in order to avoid a new trial. The United States Supreme Court held, in substance, that the attempt to cure the error was inadequate, since the misconduct of plaintiff's counsel may have produced a verdict which was wholly wrong and not merely excessive.

In the present case, the only issue submitted to the jury for its decision was that of damages. As the California Supreme Court has stated:

> "Defense counsel's unequivocal invitations to a plaintiff's verdict can only be construed, in legal significance, as a concession of liability under the Federal Employers' Liability Act or the Safety Appliance Act, or both of them, in spite of earlier formal denials of such liability." (R.O. 4).

Furthermore, in the various stages of the proceedings in this case, three state courts have considered the defendant's attacks upon the verdict, and there has been no determination, as there was in the *Moquin* case, that the record showed that the verdict was excessive. In its motion for a new trial and in its appeal to the state appellate courts, the defendant contended that the verdict was excessive as a matter of law. This contention was never accepted by the state courts.

In *Moquin*, therefore, there was a determination by the state court that the verdict had been vitiated by the improper conduct of plaintiff's counsel, but

the state court's attempt to remedy the error was inadquate. In the present case, there has been no determination by any court that the verdict was based on passion or prejudice, and the State Supreme Court, applying its own procedural rules in a uniform and impartial manner, has decided that the defendant's right to assert the claim of misconduct on appeal has been waived. It is apparent that there is no conflict whatsoever between *Moquin* and the present case.

II.

The Question of the Right to a Unanimous Jury Verdict Was Never Raised in the State Court, and This Contention is Not Entitled to any Consideration at This Time.

Unless a federal question has been seasonably raised in accordance with the requirements of state law, it is entitled to no consideration by the United States Supreme Court. (*Edelman v. California*, 344 U.S. 357, 358; *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 477). At no time during any of the proceedings in the state court did the defendant ever assert that it was entitled to a unanimous jury verdict in this Federal Employers' Liability Act case. That contention first appeared in the Petition for a Writ of Certiorari. It is not properly before this Court, and it should not be considered by this Court.

III.

There is no Uncertainty or Lack of Uniformity in the Decisions Denying a Federal Right to a Unanimous Jury Verdict in a State Action Under the Federal Employers' Liability Act.

In *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211, the Supreme Court held that there was no federally guaranteed right to a unanimous jury verdict in a state action brought under the Federal Employers' Liability Act. This rule was subsequently reaffirmed. (*Chicago R. I. & P. R. Co. v. Ward*, 252 U.S. 18). The reasoning underlying the holding in *Bombolis* is that state courts are not under any compulsion to provide the jury which is required of federal courts by the Seventh Amendment. This reasoning was not repudiated, nor was it questioned, in *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359. It is still constitutionally valid. In recent decisions several State Supreme Courts have manifested their understanding that the rule of *Bombolis* still prevails, and they have adhered to the principle that state courts are not restricted by the Seventh Amendment, either in actions under the Federal Employers' Liability Act (*Vivian v. Atchison, Topeka & Santa Fe Railway Co.*, 69 N.M. 6; 363 P. 2d 620) or in other actions involving the application of federal substantive law (*Irwin v. Globe-Democrat Publishing Company*. (Sup. Ct. of Missouri) 368 S.W. 2d 452, 459; cert. den. 375 U.S. 908). Even if petitioner had raised

this point in a timely manner, it has offered no sound reason why the *Bombolis* decision should be reconsidered.

Conclusion

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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